Office-Supreme Court, U.S.
FILED
JAN 13 1984
ALEXANDER L. STEVAS,
CLERK

84-12

No. _____

IN THE

Supreme Court of the United States

October Term 1983

ADONIOUS COLEMAN

Petitioner,

against

THE STATE OF NEW YORK

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

SAM POLUR, Esq.
Attorney for Petitioner
35 Montgomery Street
New York, New York 10002
(212) 608-7749

55 pp

QUESTION PRESENTED

Whether the criminal defendant was denied effective assistance of counsel under the Sixth Amendment, where consultation before trial consisted of a single twenty minute meeting, no potentially helpful character witnesses were interviewed, no visit to the scene of the arrest was made, no factual investigation of events prior to the defendant's arrest was made, counsel had not reviewed the grand jury testimony and memo book entries of the arresting officers, no defense was interposed, trial testimony lasted one day, and where defense counsel categorized his client as a thief caught in the act and trying to avoid apprehension, thus prejudincing the jury and preventing a fair trial and an impartial verdict.

TABLE OF CONTENTS

	PAGE
Question Presented.....	I
Table of Authorities.....	II
Opinions Below.....	1
Jurisdiction.....	1
Constitutional Provision Involved.	2
Statement.....	3
Reasons for Granting the Writ.....	6
Conclusion.....	28

TABLE OF AUTHORITIES

Cases:

United States Supreme Court:

Anders v. California, 386 U.S. 738 (1967)..... 25

Engle v. Isaac, 456 U.S. 107 (1982)..... 7

McMann v. Richardson, 397 U.S. 759 (1970).....6, 7

Powell v. Alabama, 287 U.S. 45 (1932)..... 15

Cuyler v. Sullivan, 446 U.S. 335 (1979).....26, 27

Federal Courts:

Barnes v. Jones, 665 F. 2d 427 (2d Cir. 1981), rev'd, 103 S. Ct. 3308 (1983)..... 8

Dyer v. Crisp, 613 F. 2d 275 (10th Cir. (1980)..... 8

Fernandez v. United States, 553 F. Supp. 260 (S.D.N.Y. 1982).....9

Moore v. United States, 432 F. 2d 730 (3d Cir. 1970).....13

Smotherman v. Beto, 276 F. Supp. 579 (N.D. Tex. 1967).....15

Twitty v. Smith, 614 F. 2d 325 (2d Cir. 1979)..... 8

United States v. Wight, 176 F. 2d 376 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)..... 8

United States v. Williams, 575 F. 2d 388 (2d Cir.), cert. denied, 338 U.S. 842 (1978)..... 8,9

New York State Courts:

People v. Aiken, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978)..... 10

People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981)..... 10,11

People v. Bennett, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972)..... 13

People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960), cert. denied, 365 U.S. 821 (1961)..... 9

People v. Dietz, 79 A.D.2d 476, 437 N.Y.S.2d 185 (4th Dept. 1981)..... 18

People v. Droz, 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976).....13, 14, 15,17

People v. Duke, 58 A.D.2d 31,395 N.Y.S.2d 200 (1st Dept. 1977).....23, 24, 25

People v. McGrath, 31 A.D.2d 944, 298 N.Y.S.2d 877 (2d Dept. 1969)..... 18

People v. McLaughlin, 291 N.Y. 480 53 N.E.2d 356 (1944)..... 15

People v. Sanin, 84 A.D.2d 681, 446 N.Y.S.2d 636 (4th Dept. 1981).....22, 23

People v. Schelling, 92 A.D.2d 694, 460 N.Y.S.2d 381 (3d Dept. 1983).....18, 19

People v. Sellars, 74 A.D.2d 551, 425 N.Y.S.2d 117 (1st Dept. 1980)..... 10

People v. Vasquez, 105 Misc.2d 958, 430 N.Y.S.2d 501 (S. Ct. Kings Cty. 1980)..... 15

CONSTITUTIONAL Provisions:

U.S. CONST. amend. VI. 6

Statutes:

28 United States Code Section 1254(1). 2

Other Authorities:

J. GAY, Fables: The Shepherd's Dog and the Wolf, in THE POETICAL WORKS OF JOHN GAY 249 (G. Faber ed. 1969). 21

Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289, 329 (1964) 22

Polur, Retained Counsel, Assigned Counsel: Why the Dichotomy? 55 A.B.A.J. 254, 255 (1969). 27

ADONIUS COLEMAN,
Petitioner,
-against-

THE STATE OF NEW YORK
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Sam Polur, Esq., on behalf of Adodnius Coleman, petitions for a writ of certiorari to review the judgment of the Court of Appeals of New York.

OPINIONS BELOW

The order and opinion of District Judge Conner (App. A, infra, 1a-3a) denying the petition for federal habeas corpus relief to the District Court of the Southern District of New York is unreported. The order of Justice Jiudice (App. B, infra, 4a) dismissing the petition for habeas corpus relief to the Supreme Court of New York, Dutchess County is unreported. The order of the Appellate Division, First Department (App. C, infra, 5a) affirming the judgment of conviction without opinion is reported at 95 A.D.2d 984 (1983). The order of Chief Judge Cooke denying leave to appeal to the New York Court of Appeals (App. D, infra, 6a) is not yet reported.

Jurisdiction

The order of the New York Court of

Appeals denying leave to appeal to that court was entered on November 15, 1983. (App. D, infra, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement

On September 25, 1977, Adonius Coleman, a black man in his twenties, was standing in a bus stop on a heavily raining night awaiting the arrival of a bus to take him home to his residence in Harlem. Suddenly, he was confronted with a gun pointed at him from the front of a van he had allegedly been peering into, which had been parked in the bus zone. Two police officers said he had been peering into the van and they had approached him, one saying, "excuse me." Petitioner, in great fear, bolted and ran. That flight, and the alleged placing, behind a car, of a big, brown grocery bag containing heroin that Coleman was allegedly carrying, resulted in his arrest by the officers.

Coleman was assigned an attorney, Herbert Adlerberg, to represent him at the subsequent trial. Incredibly, testimony at trial lasted only a day. No defense was interposed. Defense

counsel interviewed not one potential witness, including outstanding character witnesses, and never visited the scene of the alleged crime. Futhermore, defense counsel refused to cross-examine the chemist produced by the prosecution to prove the contents of the grocery bag found the night Coleman was arrested. The two police officers, the primary witnesses for the prosecution were only superficially cross-examined. The defense summation to the jury was an incredible introduction of damaging and deadly "facts" not in evidence. The trial resulted in conviction, and Coleman was subsequently sentenced to a term of from fifteen years to life imprisonment. (App. E, infra, 7a).

Thereafter, a notice of appeal was duly filed by prior counsel on or about December 30, 1979. Nothing more was done. Counsel disappeared.

Federal habeas corpus relief was sought hy submission of a petition and brief to the United States District Court for the Southern Dis-

trict of New York. That petition was denied by an order and opinion of the Hon. William C. Connor. (App. A, infra, 1a-3a). Thereafter,a petition for habeas corpus relief was orally argued before a Justice of the of the Supreme Court of New York, Dutchess County, at the Greenhaven Correctional Facility where the petitioner is incarcerated. Justice Joseph Jiudice dismissed the petition by an order entered in the Dutchess County court on February 10, 1982.

Notice of appeal to the Appellate Division, First Department, was duly filed by appellate counsel. The federal question currently at issue was duly raised in this court by submission of appellate briefs and oral argument, indicating the same factual and legal points raised herein. Coleman's conviction was affirmed without opinion. 95 A.D. 2d 984 (1st Dept. 1983).

Application was timely made for a certificate for leave to appeal to the New York Court of Appeals. This application was denied by Chief

Judge Cooke on November 15, 1983.

Reasons for Granting the Writ

The conviction of Adonius Coleman which, eo necessitae, had to follow from defense counsel's failure to defend at all, clearly deprived the petitioner of assistance of counsel in any meaningful sense in terms of the Sixth Amendment and constitutional imperatives under our system of law.

The criminal defendant's right to representation and assistance of counsel at trial is guaranteed by the United States Constitution. U.S. CONST. amend. VI. However, this Court has not enunciated a standard by which the level of effective representation of counsel may be assessed. In McMann v. Richardson, 397, U.S. 759 (1970), as the Court was not presented with the necessity of determining the proper standard to be used, treatment of this question was confined to the

statement that counsel must act "within the range of competence demanded of attorney in criminal c ases". Id. at 771. In this instance the representation afforded the petitioner by his defense counsel does not even rise to such a level of competence, for the reason discussed herein. This Court aptly noted that "defendants cannot be left to the mercies of incompetent counsel." Id. Later, in Engle v. Isaac, 456 U.S. 107 (1982), this Court again stated that "the Constitution guarantees defendants...a competent attorney". Id. at 134.

The delineation of a standard by which such competency and effectiveness of counsel may be guaged has been the source of continuous reformulation and. intense debate over the years. The majority of the federal circuit courts have developed a stringent standard under which the focus of inquiry is whether defense counsel has exhibited "reasonable competence". The latest circuit court to adopt such a standard is the

Tenth Circuit, requiring that defense counsel act in a reasonably competent and skillfull manner. Dyer v. Crisp, 613 F. 2d 275 (10th Cir. 1980).

The Second Circuit, alone, continues to apply the traditional requirement that defense counsel's inadequate performance be "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." Twitty v. Smith, 614 F. 2d 325, 333 (2d Cir. 1979): United States v. Wight, 176 F. 2d 376, 379 (2d Cir. 1949), cert denied, 338 U.S. 950 (1950). Several members of that circuit advocate the adoption of a "reasonable competence" standard, Barnes v. Jones, 665 F. 2d 427, 431, n.4 (2d Cir. 1981), rev'd,103 S. Ct. 3308 (1983), and in several cases the court has assessed defense counsel's performance under the "farce and mocker" standard, while indicating that the same result would prevail under a "reasonable competence" standard. See, United States v. Williams, 575 F. 2d 388, 393 (2d Cir.), cert denied. 439 U.S. 842 (1978) (counsel's "perfor-

mance neither was so deficient as to make the proceedings a farce and mockery of justice, nor did it fall below the standard of the 'reasonably competent assistance of an attorney acting as (a) diligent advocate' "). Nevertheless, the "farce and mockery" standard was followed as recently as Fernandez v. United States, 553 F. Supp. 260 (S.D.N.Y. 1982). The court, noting that while other circuits utilize the higher "reasonable competence" standard, held that the standard in the Second Circuit governing the effective assistance of counsel "continues to be the much lower 'farce and mockery of justice' standard. . . ." Id. at 265.

The New York Court of Appeals traditinonally utilized this "farce and mockery" standard in determining the threshhold requirements of counsel's level of representation. People v. Brown, 7 N.Y. 2d 557, 558, 197 N.Y.S. 2d 705, 707 (1960), cert. denied, 365 U.S. 821 (1961). Recently, the court has moved away from this

approach towards a requirement of reasonable competence, displaying "a greater desire to avoid the confining structures of a standard presumptively applicable to all cases." People v. Aiken, 45 N.Y. 2d 394, 398, 380 N.E. 2d 272, 274, 408 N.Y.S. 2d 444, 447 (1978). The Aiken court, without adopting one standard in favor of the other, affirmed that "application of either standard mandates the conclusion that appellant was not denied the right to effective assistance of counsel." 45 N.Y. 2d at 339, 380 N.E. 2d at 275, 408 N.Y. S. 2d at 447. The First Department, to which this petitioner had appealed, then adopted the "reasonable competence" standard in People v. Sellers, 74 A.D. 2d 551, 425 N.Y.S. 2d 117, 118 (1st Dept. 1980).

More recently, the Court of Appeals asserted that "(w)hat constitutes effective assistance of counsel is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation."

People v. Baldi - 54 N.Y. 2d 137, 146, 429 N.E. 2d 400, 404, 444 N.Y.S. 2d 893, 897 (1981). The Baldi court then recited the standard of review to be used in cases involving the question of effective assistance of counsel: "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation the constitutional requirement will have been met." 54 N.Y. 2d at 147, 429 N.E. 2d at 405, 444 N.Y.S. 2d at 898.

The glaringly ineffectual representation afforded the defendant clearly falls within this standard of review, and rises to a level of ineffectiveness when measured by a standard of "reasonable competence". In truth and in fact, defense counsel failed to defend.

The record is replete with errors of Constitutional magnitude by assigned 18-B counsel which, taken as a whole, amount

to ineffective assistance of counsel so as to have deprived Adonius Coleman of a fair trial.

Adonius Coleman was arrested on September 13, 1979. During this period, Coleman met with his defense attorney once at his attorney's law office for a period of approximately twenty minutes. No other attorney-client meeting was again held, of any duration, outside courtroom. During this interval of two years before Coleman's trial, no character witnesses were interviewed, nor did defense counsel deign to visit the scene of the defendant's arrest. No factual investigation was initiated concerning the events which transpired prior to Coleman's confrontation with the police by that Harlem bus stop on that heavily raining night. Counsel's articulated "strategy" was no strategy. And no defense. It was to implicate his client, with no record support whatsoever, by stating his client was guilty and "was caught in the act with his hand in the cooky jar, trying to avoid apprehension." (App. F, infra, 28a).

It is axiomatic that a "defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial." People v. Bennett, 29 N.Y. 2d N.Y. 2d 462, 466, 280 N.E. 2d 637, 639, 329 N.Y.S. 2d 801, 804(1972). Such preparation "often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom". Moore v. United States, 432 F. 2d 730, 735 (3rd Cir. 1970).

This situation is also comparable on this point to that presented in People v. Droz, in which defense counsel made little or no effort to prepare for trial and did not attempt to contact potentially helpful witnesses. The Droz court addressed this lack of preparation, stating:

We have often noted

> that it is impossible to precisely define "inadequate" or "ineffective" legal representation or "to formulate standars which will apply to all cases." However, it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense and who is familar with, and able to employ at trial basic principles of criminal law and procedure. Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors, particularly on basic points essential to the defense, are often found to be determinative.

People v. Droz, 39 N.Y. 2d 460, 462, 348 N.E. 2d 880, 882, 384 N.Y.S. 2d 404, 407 (1976). Although counsel in Droz failed to consult with the defendant before the first day of trial, in the instant

case, a sole consultation of nearly twenty minutes, interspersed with a few telephone calls, cannot be said to rise to the level of adequate consultation and/or preparation. This Court, in Powell v. Alabama, 287 U.S. 45,57 (1932) recognized that without "consultation, thoroughgoing investigation and preparation" which are "vitally important," by defense counsel, defendants would necessarily be deprived of the "aid of counsel in any real sense." People v. Vasquez 105 Misc. 2d 958, 961, 430 N.Y.S. 2d 501, 504 (Sup. Ct. Crim. Term, KingsCty.1980). cf. Smotherman v. Bito, 276 F. Supp. 579 589-90 (N.D. Tex. 1967) (counsel's failure to investigate, inquire and prepare adequately for trial, where counsel consulted with defendant briefly only once before trial was ineffective representation and a mere pro forma appearance)."(w)hat has been said about (the need for adequate) investigation is equally applicable to consultation between defendant and his counsel. Vasquez, 105 Misc. 2d at 961, 430 N.Y.S.2d at 504;

People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).

The failure to consult, prepare or investigate before trial was graphically emphasized by the concommitant failure to assert the indispensible opening statement. The defense was thereby bereft of the opportunity to foster the climate of receptivity essential to the most meaningful defense. (App. F, infra, 9a).

Furthermore, defense counsel was apparently disinterested in the Rosario material, although it included Officer Laird's grand jury testimony, a copy of the arrest report as well as the memo book entries of Officer Laird and Officer Guarino. This is highlighted at the pre-trial suppression hearing, where defense counsel requested time to merely scan such materials following Officer Laird's direct examination by the prosecution:

> MR. MANCI: Your Honor, before I call my first witness,

> I would just like the record to reflect that I have served on defense counsel a copy of all the Rosario material which includes the grand jury testimony of Officer Laird and Officer Guarino, and a copy of the arrest report and 61.
>
> MR. ADELBERG: Well, your Honor, in that case, after the officer testifies on direct, I will ask for a few moments. (emphasis added)

(App. F, infra, 8a).

The brief and shallow interrogation, the total failure to probe and attempt to find and disclose impeaching and contradictory statements - the very heart of the Rosario doctrine - was caverlierly ignored as seen by the cited transcript, supra: "I will ask for a few moments." The effect of this counsel's cursory glance at these materials of inestimable value for possible impeachment purposes of a primary witness, is akin to the situation in Droz,where defense counsel did not even request a copy

of the prior grand jury testimony of the witness to a narcotics sale. People v. Droz, 39 N.Y.S. 2d at 408.

While unsuccessful trial strategy does not amount to ineffective assistance of counsel in every case, a seminal issue is always whether appointed or retained counsel failed to provide effective representation so as to deprive the defendant of a fair trial. Where such counsel "elicits incriminating evidence against his own client, which is not part of a discernible or reasonably plausible trial strategy, courts have not been hesitant to reverse convictions. People v. Dietz, 79 A.D. 2d 476, 477-78, 437 N.Y.S. 2d 185, 187 (4th Dept. 1981). Illustratively, in People v. Schelling, 92 A.D. 2d 694, 460 N.Y. S. 2d 381, 382 (3rd Dept. 1983), the court found that "(o)n cross-examination in almost every instance, counsel unnecessarily developed more adverse information than positive, some of it very damaging to defendant." Logic and justice dictate that where the defendant's own

counsel categorizes the accused in an unfair and prejudicial manner, a similar result should prevail. In People v. McGrath, 31 A.D. 2d 944, 298 N.Y.S. 2d 877, (2d Dept.1969), the defendant was deprived of the effective assistance of counsel at a hearing to withdraw the defendant's guilty plea, even though a Legal Aid attorney participated in the hearing, at the court's request, to assist in determining the defendant's position:

> However, we are constrained to reverse because defendant was deprived of the effective assistance of counsel at the hearing when his assigned attorneys in effect took a position adverse to him and contradicted his allegations that they knew he was innocent but, nevertheless advised him to lie to the court, as he would get a light sentence, if he pleaded guilty.

In this instance, defense counsel's comments during summation could only prejudice the jury and prevent their impartial

verdict, or a verdict of not guilty.

> Adonius Coleman is what he actually is, what he appears to be and what he first appeared to be to the police officers -- a thief. Possibly a burglar who breaks into vehicles when nobody is around on deserted streets at 2 o' clock in the morning. A petty larceny thief. Not a purveyor and trafficker in fifteen thousand dollars worth of hard drugs.
>
> ...
>
> Consider his furtive conduct. He ducked, tried to get out of the way to avoid the police. Is this consistent with his being a thief? It certainly is. Someone who was caught in the act with his hand in the cooky jar, trying to avoid apprehension. He then flees, takes off, opens up that 75-foot gap as he runs down 114th street.
>
> Is this fact consistent with having been caught with the fruits of the crime and trying tc unload them as fast as he possibly can? It certainly is.

(App. F, infra, 27a - 29a).

By categorizing his client as a "thief" and surmising that the defendant was engaged in "casing the van" and was caught with his hand in the cooky jar," defense counsel lived up to prophetic immorality of the verse, all too true in the instant case, that "An open foe may prove a curse, but a pretended friend is worse." J. Gay, Fables: The Shepherd's Dog and the Wolf, in THE POETICAL WORKS OF JOHN GAY 249 (G. Faber ed. 1969), quoted in Spano v. New York, 360 U.S. 315, 323 (1959).

A noted commentator, addressing a situation such as the instant case, has stated:

> "Occasionally, however, the conduct of defense counsel in a criminal case, deliberate or inadvertent, so embarasses his client's cause as to cast a shadow of unfairness across his trial. Courts have been willing to grant post-conviction relief where such conduct has no discernible foundation in the legitimate

> trial tactics and posed a substantial risk of prejudice to the accused. Where, for example, defense counsel has gone beyond disarming reference to his client's prior felony convictions and has categorized the accused in a manner that could only prejudice the jury against him, post-conviction relief has been ordered on the ground that defense counsel's own comments prevented his client from receiving a fair trial and an impartial verdict."

Waltz, Inadequacy of Trial Defense Representation As a Ground for Post-Conviction Relief in Criminal Cases,59 Nw. U. L.Rev 289, 329(1964).

A situation similar to this case was illuminated by the New York Appellate Division, Fourth Department, in People v. Sanin. The court, in discussing defense counsel's conduct in a narcotic's case, with similarities to the case at bar, found:

> On cross-examination defense counsel, in purporting to paraphrase

> pound the prejudice, during his summation he referred to defendant as "snorting cocaine" although there was nothing in the testimony to suggest that.

People v. Sanin, 84 A.D.2d 681, 682, 446 N.Y.S.2d 636, 638 (4thDept. 1981).

Likewise, the New York Appellate Division, First Department also reversed a conviction where representation the defendant received by assigned counsel was not "adequate or effective in any meaningful sense of the words." People v. Duke, 58 A.D.2d 31, 33, 395 N.Y.S.2d 200, 201 (1st Dept. 1977), quoting People v. Droz, 39 N.Y.S.2d at 463, 348 N.E.2d at 883, 384 N.Y.S.2d at 408.

In People v. Duke, 58 A.D.2d 31, 395 N.Y.S.2d 200, 201 (1st Dept. 1977), defense counsel egaged in similar tactics of destroying her own client. Judgment of conviction was reversed and a new trial ordered. The offending language, not remotely as devastating to her client's interests as in the present case, nonetheless reveal what the court

on appeal will strike. The Per Curiam opinion highlights follow:

> "It's hard for me to say that officers might have lied on the stand. They might have. They might not have. What reason would they have to lie? Well, if you don't convict this defendant you let him walk out of here free. Then that whole operation, all the money that went into that buy operation 39 forget about it, it's down the drain."
>
> ...
>
> "* * * And I admit to you that the corroboration of all of the officers is overwhelming. Were you to find this defendant guilty I couldn't criticise you for that decision because the testimony overwhelmingly corroborates both undercover officers.
>
> However, when I opened up to you I asked you, I beseeched you, to keep your minds open and try to believe the defendant. It's possible he's telling the truth. It's possible he's not."

Id.

The First Department found that "(a)n examination of the summation disclosed that, to say the least, it was weak, ineffective and of no help to the

defendant. It leaves one with the impression that it was, in effect, an argument for the conviction of the defendant." Id. This analysis is highly appropriate herein, where defense counsel's summation leaves one doubting whether he was, indeed, advocating the defense of his client, rather than ineluctibly insuring Coleman's prosecution and conviction. This Court, in Anders v. California, 386 U.S. 738, 744 (1967), unequivocally stated that constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." The Duke court, after analysis, found that there was "ample proof to justify the jury's verdict of guilty, but, despite this, the defendant was entitled to a fair trial and a review of the record has convinced the majority that he did not get it because of his counsel's actions." Id. In light of these decisions, Adonious Coleman's conviction must be reversed, as he, too,

was deprived of a fair trial due to the actions and conduct of his trial counsel. Allowing this conviction to stand is, at best, a Pyrrhic trophy for our criminal justice system; and, at worst, a repudiation of our constitutional principles.

This Court should extend the doctrine of fairness with respect to retained counsel vis-a-vis assigned counsel as articulated in Cuyler v. Sullivan, 446 U.S. 335, at 334 (Oct. Term 1979):

> A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer.

> could reduce or forfeit the defendant's entitlement to constitutional protection.

That historic enunciation in Cuyler, Id., which now provides that retained counsel no longer may rely on the outmoded "respndeat superior" defense where they may have egregiously failed to provide an effective defense to a trusting client, should be further buttressed by this Ccurt. New and persuasive standards should be mandated by this Tribunal. The clash amongst the Circuits should be resolved as to the adequacy of trial representation by defense counsel. As in Cuyler, Id., the formulation should cut through artificial distinctions. See, Polur, Retained Counsel, Assigned Counsel: why the Dichotomy?, rr A.B.A.J. 254, 255 (1969).

Conclusion:

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Sam Polur, Esq.

April 4, 1984

APPENDIX

TABLE OF CONTENTS

Page

Order and Opinion denying habeas corpus relief to the District Court of the Southern District of New York.....1a

Order dismissing petition for habeas corpus relief to the Supreme Court of New York, Dutchess County..... 4a

Order of affirmance of Appellate Division, First Department.....5a

Order denying leave to appeal to the New York Court of Appeals...6a

Sentencing and Commitment report of the Supreme Court of New York, New York County..... 7a

Transcript Highlight of September 11, 1979 Suppression Hearing..... 8a

Transcript Highlight of September 13, 1979 Trial..... 9a

Transcript of Defense Summation of September 13, 1979..... 10a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADONIOUS COLEMAN,	81 Civ. 7470 (WCC)
Petitioner,	
-against-	OPINION AND
CHARLES SULLY,	ORDER
Respondent.	

A P P E A R A N C E :

SAM POLUR, Esq.
Attorney for Petitioner
212 West 233 Street
New York, N.Y. 10463

CONNER, D. J. :

Adonious Coleman, represented by counsel, has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S. C. § 2254, contending that the conduct of this court-appointed trial counsel deprived him of his federal constitutional right to effective assistance of counsel, as well as related claims. From the pa-

pers submitted by petitioner and his attorney, it does not appear that these claims have ever been presented to the state courts, which is a prerequisite to their considerationby a federal habeas corpus court. 28 U.S.C. § 2254(b); Picard v. Connor, 404 U.S. 270 (1971). Accordingly, pursuant to Rule 4, 28 U.S.C. foll. § 2254, the petition is dismissed without prejudice for failure to exhaust state remedies.

SO ORDERED.

S/ William C. Connor
United States District Judge

Dated: New York, New York
December 15, 1981.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADONIOUS COLEMAN, Petitioner, -against- CHARLES SULLY, Respondent.	81 CIVIL 7470 (WCC) JUDGMENT

The above captioned petitioner having filed a petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. Sec. 2254 and said petition having been submitted to the Honorable William C. Connor, United States District Judge, and the Court thereafter on December 15, 1981, having handed down its decision denying the said petition, without prejudice for failure to exhaust state remedies, it is,

ORDERED, ADJUDGED AND DECREED: That the petition be and it is hereby denied without prejudice for failure to exhaust state remedies.

Dated: New York, New York
December 17, 1981

s/
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

THE PEOPLE OF THE STATE OF NEW YORK ex rel., ADONIOUS COLEMAN Petitioner -against- CHARLES SCULLY, SUPT. GHCF Respondent	Index No. 1982/255 JUDGMENT MOTION DATE 2/5/82 CALENDAR NO.3

After a hearing, the petition is dismissed and the petitioner is remanded to the custody of the respondent.

So ordered.

The attention of the petitioner's counsel is directed to the Rules of the Appellate Division, Second Judicial Department, Part Two, relating to a petitioner's right to appeal.

s/
J.S.C.
Joseph Jiudice

Dated: February 10th, 1982

SAM POLUR, ESQ.
80 WALL STREET, SUITE 519-520
NEW YORK, NY 10005

At a term of the Appellate ivision of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 21, 1983

Present - Hon. David Ross Justice Presiding
John Carro
Sidney H. Asch
E. Leo Milonas
Bentley Kassal, Justices

The People of the State of New York, Respondent, -against- Adonious Coleman, Defendant-Appellant.	ORDER ON AFFIRMANCE ON APPEAL FROM JUDGMENT 17159

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Shirley R. Levittan, J.), rendered on December 17, 1979, convicting the defendant of criminal possession of a controlled substance in the first degree,

nd said appeal having been argued by Sam Polur of counsel for the appellant, and by Michael H. Warren of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

s/_____

Clerk

Counsel for appellant is referred to § 606.5 of the Appellate Division, First Department.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. LAWRENCE H. COOKE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- ADONIOUS COLEMAN, Defendant-Appellant.	CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Request for a hearing denied.

Dated at Monticello, New York

November 15, 1983

s/ Lawrence H. Cooke

Chief Judge

SENTENCE AND COMMITMENT (excerpts)

Part 39 County of New York

The People of the State of New York : Date: December 17, 1979

vs. : Present: Hon. Shirley R. Levittan, J.

Adonious Coleman .

. . . . . .

The above named defendant having been convicted of the crime of criminal possession of a controlled substance first degree under the above-designated indictment, it is

ORDERED, that the said defendant be and hereby is sentenced to an indeterminate term of imprisionment which shall have a maximum term of life years and a minimum term of 15 years,

. . . . . .

and that the said defendant be and hereby is committed to the custody of the Department of Correctional Services of The State of New York until released in accordance with the law.....

Remarks: Court requests that Parole Board consider defendant for release at the earliest date possible.

12/17/79 s/

Clerk of the Court

Y6 Colloquoy 6

(all emphasis added)

MR MANCI: Your Honor, before I call my first witness, I would just like the record to reflect that I have served on defense counsel a copy of all the Rosario material which includes the grand jury testimony of Officer Laird, memo book entries of Officer Laird and Officer Guarino and a copy of the arrest report and the 61.

MRL ADLERBERG: Well, your Honor, in that case, after the officer testifies on direct, I will ask for a few moments.

THE COURT: No problem.

MR MANCI: One additional item.

I have here a diagram of the area prepared by Officer Laird. It is the only copy I have.

I will turn it over to defense counsel for him to peruse when he looks at the rest of the material. This is a hand-

written diagram.

. . . . . .

Y14 Opening - People 84

. . . . . .

THE COURT: Thank you, Mr. Manci.

MR ADLERBERG: Your Honor, the defendant declines to make any opening remarks to the jury.

THE COURT: Certainly.

. . . . . .

8bs4 207

DEFENDANT'S SUMMATION (excerpts)

. . . . . .

. . . I don't have the opportunity of the chance later on as Mr. Manci talks to you to answer any of the arguments that he may raise, but hopefully now as you consider the arguments that I raise, and I hope my arguments are based upon the evidence, what there was of it. . .

Now, if I misstate any of the evi-

ence as I intend to review some of it . .

. . . it is of critical importance that the people who are to determine what the truth is and where the truth lies to be above all fair and impartial, and that's why, actually, this trial is a classic example of the selection of the jury taking longer than the trial itself. The jury selection started, if I recall, last Wednesday lasted approximately two days and the trial actually one day.

. . . . . .

This is a situation where the defendant has not testified. He has not taken the stand. He has rested immediately upon the end of the People's case. He has offered no evidence whatsoever.

. . . . . .

Proof beyond a reasonable doubt, and beyond a reasonable doubt means exactly what

the words imply. After hearing all the evidence, after reviewing the tangible evidence in the case, after observing the witnesses and their demeanor on the stand you feel convinced that the defendant is guilty and that feeling hangs in there, it doesn't sleep, it doesn't look appealing one minute when you are in the jury room. It is a solid feeling that you are convinced. It means it remains in place. It means you have a feeling of comfort as opposed to a feeling of discomfort. To put it very plainly in modern vernacular, you are pretty damn sure.

. . . . . .

Now, let's examine the proof with respect to the first element and actually there is no contest on the proof with respect to the first element. I didn't even cross examine the lab technician. We are not disputing the fact that there was

heroin that was recovered from that bag. So the first element is uncontested, uncontradicted.

Let's get to the second elements. Did the People prove that the defendant possessed the bag?

Now, I don't intend to dwell too long on this element. . .

. . . . . .

Now, you may find the proof on the question of possession a bit hard to swallow. You may and you may not. I'm not arguing the point.

. . . . . .

Does that strike a chord in your brain and cause you to hesitate a bit? Because if it doesn't sit well with your common sense, there is a bery good reason for that. The reason is that Adonious Coleman is what he actually is, what he appears to be and what he first appeared to be to the police officers - a thief.

Not a purveyor and trafficker in fifteen thousand dollars worth of hard drugs.

Did he have an opportunity to get into that van? He most certainly did.

. . . . .

. . . Did he steal from the van? Were those drugs originally in the van?

I suggest to you it is a logical inference . . .

. . . . . .

Consider his furtive conduct. He ducked, tried to get out of the way to avoid the police. Is this consistent with his being a thief? It certainly is. Someone who was caught in the act with his hand in the cooky jar, trying to avoid apprehension. He then flees, takes off, opens up that 75-foot gap as he runs down 114th street.

Is this fact consistent with his having been a thief caught in the act? It certainly is.

He then abandons the property while being chased.

Is that fact consistent with having been caught with the fruits of the crime and trying to unload them as fast as he possibly can? It certainly is.

. . . . . .

Now, you may feel as you sit here now that he was a thief and he did steal the stuff . . . Obviously the law is designed to punish traffickers in narcotics, not petty larceny thieves. . .

No. 84-12

Office - Supreme Court, U.S.
FILED
SEP 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

ADONIOUS COLEMAN,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 553-9000

NORMAN BARCLAY
MICHAEL H. WARREN
Assistant District Attorneys
Of Counsel

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Reasons for Denying the Writ	4
1. Any Conflict Among The Federal Circuit Courts Regarding The Constitutional Standard For Effective Assistance Of Counsel Has Already Been Resolved By Decisions Of This Court And The Second Circuit	5
2. The Standard Followed By The New York State Courts And Applied In Evaluating Petitioner's Claim Of Ineffective Assistance Of Counsel Conforms With That Followed In The Federal Courts	6
3. The Record In The State Court Does Not Raise The Question Presented In The Petition	8
4. The State Court's Conclusion That Petitioner Was Not Denied The Effective Assistance Of Counsel Presents No Issue Meriting Review By This Court, And, In Any Event, Was Correct	9
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases:

Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) 5
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 5

Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970) 5
Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979) 5

Davis v. Alaska, 415 U.S. 308 (1974) 4, 9
Dyer v. Crisp, 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980) 5

Fiumara v. United States, 727 F.2d 209 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 2154 (1984) 6

Johnson v. Massachusetts, 390 U.S. 511 (1968) 8

Katzinger v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947) 4

Magnum Co. v. Coty, 262 U.S. 159 (1923) 9
Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978) 5
Massachusetts v. Painten, 389 U.S. 560 (1968) 8
Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) 5

People v. Aiken, 45 N.Y.2d 394 (1978) 7
People v. Beaulieu, 40 A.D.2d 942 (4th Dept. 1972) 10
People v. Droz, 39 N.Y.2d 457 (1976) 7
People v. Jackson, 74 A.D.2d 585 (2d Dept. 1980) 7
People v. Kass, 25 N.Y.2d 123 (1969) 10
People v. Sellars, 74 A.D.2d 551 (1st Dept. 1980) 7

PAGE

Strickland v. Washington, —— U.S. ——, 104 S.Ct. 2052 (1984) 6, 11

Trapnell v. United States, 725 F.2d 149 (2d Cir. 1983) 6

United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976) 10
United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978) 5
United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) 5
United States v. Dukes, 727 F.2d 34 (2d Cir. 1984) 6
United States v. Easter, 539 F.2d 663 (8th Cir. 1976) 5
United States v. Wight, 176 F.2d 376 (2nd Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) 5
United States ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975) 5

Statutes:

New York Penal Law §70.00[3][a][i] 2
New York Penal Law §220.21 1

Other Authorities:

Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978) 4, 9

No. 84-12

IN THE

Supreme Court of the United States

October Term, 1984

ADONIOUS COLEMAN,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioner Adonious Coleman seeks a writ of certiorari to review a June 2, 1983, order of the Appellate Division, First Department, of the New York Supreme Court. That order affirmed, without opinion, a September 17, 1979, order of the New York Supreme Court, New York County, convicting petitioner, after a jury trial, of Criminal Possession of a Controlled Substance in the First Degree (New York Penal Law §220.21), and sentencing him to from fifteen years to life imprisonment.

Statement of the Case

On September 25, 1977, at approximately 2:00 a.m., two officers of the New York City Police Department observed petitioner, in the midst of a heavy rainstorm, lingering suspiciously behind a parked van. Upon observing the officers, petitioner fled. The officers pursued and, during the chase, petitioner attempted to conceal behind a parked car a bag containing over $15,000 worth of heroin. The drugs were recovered and petitioner was captured.

By Indictment No. 3981/77, petitioner was charged with one count of Criminal Possession of a Controlled Substance in the First Degree, an offense which upon conviction required imposition of a minimum prison term of from 15 years to life (Penal Law §70.00[3][a][i]).

On September 11, 1979, at a pre-trial hearing held before Justice Shirley Levittan of the New York State Supreme Court, counsel for petitioner moved to suppress the recovered narcotics and statements made by petitioner at the time of the arrest. On that date, the court denied the motion to suppress the drugs and granted the motion to suppress the statements.

Petitioner proceeded to trial before Justice Levittan and a jury on September 13, 1979. At trial, the officers who arrested petitioner testified regarding the events underlying petitioner's apprehension. A chemist employed by the New York City Police Department testified that the material recovered from petitioner was in fact heroin.

Upon the close of the People's case, petitioner's trial counsel argued in summation that the People's evidence failed to demonstrate beyond a reasonable doubt that petitioner had possessed the bag containing the recovered narcotics. Counsel also argued that even if the jurors found that petitioner had in fact possessed the heroin, the evidence at trial did not support the conclusion that he had knowingly possessed the narcotics but rather that he had recently stolen the drugs from the van behind which he had been lingering before his arrest. Accordingly, counsel argued that petitioner should be acquitted of the crime charged. Upon the conclusion of summations, the case was submitted to the jury and on September 17, 1979, petitioner was found guilty as charged.

On appeal to the Appellate Division, First Department, petitioner argued that the proof of his guilt was insufficient to support the verdict. Petitioner also argued that he was denied his sixth amendment right to the effective assistance of trial counsel. Specifically, petitioner asserted that his counsel had failed to pursue certain lines of defense and had failed to call witnesses who would have testified regarding petitioner's good character. Petitioner also argued that counsel had inadequately prepared and that he had improperly prejudiced petitioner by suggesting on summation that petitioner had committed a theft on the night of his arrest.

By an order dated June 21, 1983, the Appellate Division unanimously and without opinion affirmed petitioner's judgment of conviction. 95 A.D.2d 984. On November 15, 1983, the New York State Court of Appeals, denied leave to appeal. 60 N.Y.2d 965 (Cooke, Ch. J.).

In this application, petitioner continues to assert that he was denied the effective assistance of counsel, by virtue of his trial counsel's inadequate preparation, his failure to call character witnesses and his advancement of the defense that petitioner was, at most, guilty of theft. Petitioner argues that this Court should review trial counsel's performance in order to articulate a standard by which criminal defense counsel's performance should be judged under the sixth amendment and to thereby resolve a dispute among the federal circuit courts as to that standard.

Reasons for Denying the Writ

Generally, this Court will grant a petition for a writ of certiorari only where there exists a split among the federal appellate courts as to a particular issue, or where novel questions of constitutional dimension or national import are raised. *See, e.g., Davis* v. *Alaska,* 415 U.S. 308, 315 (1974); *Katzinger* v. *Chicago Metallic Mfg. Co.,* 329 U.S. 394 (1947). *See generally,* Stern & Gressman, *Supreme Court Practice,* §4.27, pp. 315-17 (5th ed. 1978). As the discussion below demonstrates, petitioner's application should be denied since there is no dispute among the federal circuit courts regarding the legal principles governing his state appeal. Moreover, petitioner's contention that he personally was denied the effective assistance of counsel is meritless and, in any event, does not present a question of national interest or constitutional import.

1. Any Conflict Among The Federal Circuit Courts Regarding The Constitutional Standard For Effective Assistance Of Counsel Has Already Been Resolved By Decisions Of This Court And The Second Circuit.

Petitioner asserts that a writ of certiorari should be granted in order to resolve "[t]he clash amongst the Circuits" regarding the constitutionally mandated standard of competence for defense counsel in criminal trials (Petition for a Writ of Certiorari, p. 27).

True, until recently the Second Circuit applied the "farce and mockery" standard to determine whether assistance of counsel at a criminal trial was "effective," while the remaining Courts of Appeal applied a standard of "reasonable competence." *See United States* v. *Bosch*, 584 F.2d 1113, 1120-21 (1st Cir. 1978); *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *Moore* v. *United States*, 432 F.2d 730, 737 (3rd Cir. 1970); *Marzullo* v. *Maryland*, 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *Caraway* v. *Beto*, 421 F.2d 636, 637 (5th Cir. 1970); *Beasley* v. *United States*, 491 F.2d 687, 696 (6th Cir. 1974); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *United States* v. *Easter*, 539 F.2d 663, 666 (8th Cir. 1976); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1329 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981); *United States* v. *DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

However, the Second Circuit's recent adoption of the requirement that counsel in criminal cases exhibit reasonable competence resolves any dispute among the Circuits. *Trapnell* v. *United States,* 725 F.2d 149 (2d Cir. 1983). *See also, Fiumara* v. *United States,* 727 F.2d 209, 214 (2d Cir.), *cert. denied,* —— U.S. ——, 104 S. Ct. 2154 (1984); *United States* v. *Dukes,* 727 F.2d 34, 41 (2d Cir. 1984).

In any event, even in the absence of the agreement among the Circuits, there would be no reason for this Court to address the question of the proper standard for judging criminal defense counsel's performance, since it has recently done so, concluding that that standard is one of reasonable competence. *Strickland* v. *Washington.* —— U.S. ——, 104 S.Ct. 2052 (1984).

Thus, the dispute among the Circuits has been resolved and whatever ambiguity may have existed regarding this Court's interpretation of the constitutionally mandated standard of competence for defense counsel has also been clarified. There is, therefore, no pressing or constitutionally significant issue to be resolved in this case.

2. The Standard Followed By The New York State Courts And Applied In Evaluating Petitioner's Claim Of Ineffective Assistance Of Counsel Conforms With That Followed In The Federal Courts.

Not only is there no need to resolve a dispute among the federal circuits concerning the standard of competence of criminal defense counsel, but there is no need to resolve a dispute between that standard and the standard actually applied by the state courts in this case.

The New York state courts, well before the Second Circuit's abandonment of the farce and mockery standard, had rejected that standard and concluded that counsel in criminal cases must exhibit at the minimum reasonable competence. *People* v. *Aiken*, 45 N.Y.2d 394, 400-401 (1978); *People* v. *Droz*, 39 N.Y.2d 457 (1976); *People* v. *Sellars*, 74 A.D.2d 551 (1st Dept. 1980); *People* v. *Jackson*, 74 A.D. 2d 585 (2d Dept. 1980). Moreover, in recent years the New York Court of Appeals has signaled its willingness to provide even greater scrutiny of claims of ineffective assistance of counsel than that required under the reasonable competence standard, and to ascertain whether counsel's performance was "adequate or effective in any meaningful sense of the words." *People* v. *Aiken*, 45 N.Y.2d at 398.

In reviewing petitioner's claim that he was denied the effective assistance of counsel the state courts applied a standard conforming, at the very least, with that mandated by the federal courts. Indeed, petitioner's primary reliance on New York state authority, in support of his claim that he was denied the effective assistance of counsel, only underscores the state's sensitivity to such claims (See, e.g., Petition for a Writ of Certiorari, pp. 17-18, 22-24).

Thus, review of this case would not resolve any discrepancy between the federal standard for effectiveness of counsel and that adopted by New York State.* And even if a dispute on the issue existed among the Circuits, the test employed by the New York courts was the one that was

* Petitioner alludes to certain authority from other jurisdictions finding that retained counsel is subject to a lesser standard of competence than assigned counsel. The New York state courts have never drawn such a distinction. *People* v. *Aiken*, 45 N.Y.2d at 401. In any event, petitioner was represented by assigned counsel and his performance could, therefore, not have been judged under any more lenient standard than that of reasonable competence.

most beneficial to petitioner. Obviously, then, petitioner has simply presented a hypothetical controversy for this Court's review.

3. The Record In The State Court Does Not Raise The Question Presented In The Petition.

Even if petitioner asserted some constitutional issue deserving resolution by this Court, this case would not be an appropriate vehicle for that resolution.

Where the record does not clearly and specifically present a petitioner's claim and an evidentiary hearing would be needed to ascertain whether there is any basis for his factual allegations, a writ of certiorari should not be granted. *See, Johnson* v. *Massachusetts,* 390 U.S. 511 (1968); *Massachusetts* v. *Painten,* 389 U.S. 560, 561 (1968). Here, the question presented by petitioner would require such an evidentiary hearing, for it consists primarily of a series of factual allegations either not presented in, or refuted by, the state court record.

The record provides no suport for petitioner's assertions that "consultation before trial consisted of a single twenty minute meeting, no potentially helpful character witnesses were interviewed, no visit to the scene of the arrest was made, [or that] no factual investigation of events prior to defendant's arrest was made . . ." (Petition for a Writ of Habeas Corpus p. 1). Indeed, the record specifically refutes petitioner's assertion that "no defense was interposed." *Id.* Thus, before the Court could even evaluate petitioner's claims it would have to order a lengthy evidentiary hearing—a course the Court has consistently declined to take.

4. The State Court's Conclusion That Petitioner Was Not Denied The Effective Assistance Of Counsel Presents No Issue Meriting Review By This Court, And, In Any Event, Was Correct.

Finally, assuming that petitioner's contentions could be evaluated on this record, the petition should still be denied.

Shorn of surplusage, the petition for a writ of certiorari consists of nothing more than a lengthy argument that the New York state courts, while applying a standard of review conforming with that mandated by the Constitution, incorrectly concluded that petitioner had not been denied the effective assistance of counsel. Such a claim, even if meritorious, simply does not demonstrate that the case is of such national significance or constitutional import as to justify this Court's scrutiny. *See, e.g., Davis* v. *Alaska,* 415 U.S. 308, 315 (1974); *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923). *See also,* Stern & Gressman, *Supreme Court Practice,* §4.2, pp. 257-59 (5th ed. 1978). Moreover, even if the state court's ruling merited review, the petition should be denied, since petitioner has failed to make a threshold showing that his rights were violated or that the state court's ruling was incorrect.

Simply put, petitioner's entire challenge is a further expression of his post-trial dissatisfaction with his counsel's advancement of the defense that petitioner was at worst a mere thief who had unknowingly stumbled upon a cache of narcotics. The assertion of one specific defense should not raise a question of national import. In any event, the advancement of that defense, at petitioner's trial, did not violate his sixth amendment right.

Defense counsel was faced with a scenario in which the testimony of two police officers and a police chemist un-

equivocally linked his client to a cache of heroin with a street value in excess of $15,000. The only rational course to take in defending petitioner was to assert that he did not "knowingly" possess the drugs. While the jury quite properly rejected this defense, it cannot be said that petitioner was prejudiced by virtue of its advancement. No alternative defense was suggested by the record. Counsel's argument that his client may have been guilty of a crime, but not the crime with which he had been charged, carried far greater verisimilitude than the unsupported and shop-worn claim, asserted in petitioner's state appeal, that he was totally innocent and nothing more than the victim of some massive police conspiracy. (*See* "Brief and Memorandum of Law" in support of petitioner's appeal in the New York State Appellate Division, pp. 20-21). Moreover, conceding that petitioner might be a thief could hardly prejudice the defense, since there was no larceny charge before the jury on which petitioner could be convicted, and, if there had been, it would not have carried the life sentence of the drug possession charge.

Nor was petitioner prejudiced by his attorney's failure to call the character witnesses alluded to in his petition, since such a course would only have permitted the People to elicit evidence of his prior arrests and convictions. *United States* v. *Bermudez,* 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied,* 425 U.S. 970 (1976); *People* v. *Kass,* 25 N.Y. 2d 123 (1969); *People* v. *Beaulieu,* 40 A.D.2d 942 (4th Dept. 1972).*

* The New York State Board of Corrections pre-sentence report on petitioner indicates that prior to his arrest for the possession of heroin, petitioner had been convicted as a youthful offender and had been arrested at least ten times for offenses including possession and sale of narcotics, weapons possession, disorderly conduct, possession of stolen property and unauthorized use of a vehicle.

In sum, petitioner has cited no fact that would rebut the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland* v. *Washington,* 104 S.Ct. at 2066. Indeed, the state court correctly concluded that petitioner was not denied the effective assistance of counsel. That determination forms no basis for further review by this Court.

Conclusion

The petition for a writ of certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

NORMAN BARCLAY
MICHAEL H. WARREN
Assistant District Attorneys
Of Counsel

September 1984